IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
COREY KEMP, et al.	:	NO. 04-370

MEMORANDUM

Baylson, J. **December 2, 2004**

After argument on November 23, 2004, and review of numerous briefs, the Court decided that although the joinder of all Defendants in a single indictment was proper, nonetheless Defendants LeCroy, Snell and Carlson, who are not charged with participating in the conspiracy alleged in the indictment, should be severed from the trial of the five Defendants who remain in the case and are charged with conspiracy.

The Court's decision resolved various motions alleging improper joinder under Rule 8(b) of the Federal Rules of Criminal Procedure, and alternatively, motions for relief from prejudicial joinder or for severance, pursuant to Rule 14. The Court also ruled on certain discovery motions.

This Memorandum will explain the Court's reasons for these decisions. A summary of the indictment is set forth in the Court's Memorandum dated October 29, 2004, denying various motions to dismiss the indictment. Defendant White has died and has been dismissed as a party. Defendant McCracken has agreed to plead guilty. Five of the remaining Defendants are accused of first, joining in a conspiracy to defraud the City of Philadelphia and its citizens of the right to the honest services of Defendant Kemp who at the time was the City Treasurer, and to obtain money and property by fraud; and second, use of the mails, other interstate delivery services and

interstate wire communications, to further the scheme to defraud.

Motions to sever, filed by two of the conspiracy Defendants, Kemp and Hawkins, were denied. Trial for LeCroy, Snell and Carlson will begin January 18, 2005.

I. Summary of Reasons for Various Defendants' Motions

A. Defendant Carlson

Carlson was indicted on Counts 35 and 36 of the indictment for allegedly making false statements to the FBI, subsequent to the alleged conspiracy. Carlson argues that his alleged offenses are unrelated to the substantive charges and are "not part of the same transaction or series of transactions," (Id. ¶2) and thus joinder was improper. Alternatively, Carlson argues, because he admittedly did not participate in the transactions alleged in the indictment, as compared to the other Defendants who have been charged with substantive offenses, that a joint trial will result in substantial prejudice to him.

B. Defendants LeCroy and Snell

LeCroy and Snell were both employed by J.P. Morgan Chase, and are accused in Counts 26-27 of persuading their employer to make a payment to Defendant White in the amount of $50,000, for legal services that were never rendered, thus defrauding their employer of the $50,000 by asserting that White did in fact perform legal services. Following the death of Defendant White, who was also a named Defendant in the same Counts, they assert that any proper grounds for joinder have disappeared and thus severance is required, or should be granted as a matter of fundamental fairness.

C. Defendant Kemp

Defendant Kemp, former City Treasurer, argues that the allegations against him constitute

two separate conspiracies, one to deprive the citizens of Philadelphia of Kemp's honest services, and the other a "church loan scheme" in which Kemp allegedly conspired with Defendant McCracken to fraudulently obtain and misappropriate a construction loan for St. James Chapel Church. Kemp argues that the two conspiracies are based upon separate transactions which do not constitute a common plan, scheme or design, and therefore should be tried separately.

D. Defendant Hawkins

Defendant Hawkins asserts that he is only charged with a small portion of the overt acts and the "manner and means" compared to other Defendants charged with conspiracy, and that it would be unfair to try Hawkins with the other defendants.[1]

II. The Joinder of All Defendants in this Indictment Was Proper

The Court rejects the attacks of various Defendants on the joinder of offenses or Defendants. Initially, as to the objection of Defendant Kemp to the joinder of all offenses against him in a single indictment, the Court finds that all of the charges against Kemp are "of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." See Rule 8(a), F.R. Crim. P.

The more serious contention involves the joinder of all Defendants in the same indictment. The government contends that all Defendants have been properly joined in this

[1]Defendant Hawkins, and also Defendants Umbrell and Holck, in a letter to the Court, assert that severance may be required if it appears that the government intends to introduce admissions by other Defendants to law enforcement, that would require a separate trial under Bruton v. United States, 391 U.S 123 (1968). At the argument on November 23, 2004, the government indicated that it was not aware of any such admissions that it would introduce into evidence, and thus did not believe a Bruton problem would arise during the trial.

action pursuant to Rule 8(b) of the Federal Rules of Criminal Procedure. The government argues that courts have broadly construed Rule 8(b), allowing for the joinder of defendants and offenses whenever a "logical relationship" exists between the offenses. The logical relationship, argues the government, need not imply an "immediateness of their connection."

Rule 8(b) of the Federal Rules of Criminal Procedure provides in relevant part:

> The indictment or information may charge two or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately.

FED. R. CRIM. P. 8(b).

If the evidence to be introduced at trial "connects each of the defendants to an overall general scheme, joinder is proper." United States v. Stout, 499 F. Supp. 598, 599 (E.D. Pa. 1980). Rule 8(b) joinder does not require that all the joined defendants participated in all aspects of the alleged scheme. Id. The court in Stout stated that it did not matter that the indictment did not charge the defendants with a conspiracy, but it was sufficient that the government alleged a "common link" between the defendants and charges. Id. The court in United States v. Eufrasio, 935 F.2d 553, 567 (3d Cir. 1991), cert. denied 502 U.S. 925 (1991) held that the joinder of conspiracy counts with the substantive offenses provides the common link necessary for joinder. The court further noted that it is appropriate for a judge to determine proper joinder based on the charges alleged in the indictment. Id.

As long as a logical relationship exists between charges, courts will allow the joinder of defendants under Rule 8(b). As to Carlson's claim of misjoinder, multiple cases have held that joinder is appropriate when defendants are charged with perjury or obstruction of justice in

relation to the underlying offenses in an indictment. United States v. Isaacs, 493 F.2d 1124, 1159 (7th Cir. 1974). United States v. Dekle, 768 F.2d 1257, 1260 (11th Cir. 1985) allowed the joinder of a defendant's perjury claim with other defendants' drug conspiracy charges when the proof of perjury involved proving a phase of the drug conspiracy. The court in Dekle ruled that because the perjury charge of one defendant and the conspiracy charge of the other defendants arose out of the same transaction involving the sale of marijuana, the defendants were properly joined. Id. at 1262. The court stated, "[p]roof of perjury involved proving one phase of the Regans-Dekle conspiracy." Id. at 1261. The appellant in Dekle was not charged with conspiracy to possess marijuana and intent to distribute, but he was charged with perjury for allegedly lying to the grand jury about conversations he had with the other defendants and a polygraph test he had administered to the other defendants. Id. at 1261.

In addition to a "logical relationship" between charges, some cases have emphasized that the "commonality of proof" between charges warrants the joinder of charges or defendants. United States v. Hubbarb, 474 F. Supp. 64, 87 (D.D.C. 1979) held that when two conspiracies were alleged against multiple defendants – one involving the illegal collection of information from the United States Department of Justice and another to cover up the operation – an obstruction of justice charge against the defendants was properly joined, because it dealt with the conspiracies charged. The court regarded the commonality of proof as significant in allowing joinder. Id. at 87.

Any reference to a connection between charges will generally suffice for the purposes of sustaining joinder. For example, the Third Circuit affirmed denial of a misjoinder claim because the government had made cross-references between charges in its responses to pretrial motions,

even though the indictment on its face did not cross-reference charges. United States v. McGill, 964 F.2d 222, 242 (3d Cir. 1992) (holding that a court may look beyond the indictment to rule on a Rule 8 motion). After being convicted of tax evasion, McGill challenged the joinder of his tax evasion and bribery charges. The court disagreed with McGill, holding that joinder was appropriate where the defendant had engaged in an "enrichment scheme" involving both the tax evasion and the alleged bribery. Id. at 241. The case favorably cites United States v. Pisani, 590 F. Supp. 1326, 1345 (S.D.N.Y. 1984), which allowed the joinder of Pisani's perjury claim with the underlying offenses when the charges were both part of a similar scheme. McGill, 964 F.2d at 242 (citing Pisani, 590 F. Supp. at 1345).

As the case law indicates, courts allow very liberal joinder of charges and defendants. Precedent indicates that where the charges involve commonality of proof, there exists a logical relationship between the charges sufficient to justify joinder under Rule 8(b).

Specifically, as to Carlson, courts have allowed the joinder of perjury claims where the alleged perjury relates to the underlying substantive charges, regardless of whether those underlying charges are brought against the defendant charged with perjury or against other defendants. The government contends that Carlson's alleged false statements concern the underlying conspiracy and that some proof of the conspiracy is needed to prove the falsity of his statements. On the basis of the indictment, the Court concludes that the charges of false statements against Carlson are properly joined with the underlying substantive charges that name the remaining Defendants.

As to Defendants LeCroy and Snell, the Court finds that because the indictment alleges that their motivation for persuading their employer, J.P. Morgan Chase, to make the $50,000

payment to White directly relates to a fundamental allegation of the indictment (¶ 1): that White had been given power by the Mayor's instruction to his staff, possibly including former Treasurer and co-Defendant Kemp, to have a say in the awarding of city business. This allegation alone warrants joinder of the charges against LeCroy and Snell with the other Defendants. The alleged scheme involving White and Kemp provides a fundamental reason for LeCroy and Snell to work together to secure the $50,000 payment to White. Whether White performed any services for that payment remains as a matter of evidence.

White's untimely death does not change the legal propriety of the joinder. As the government has indicated in the various pretrial conferences, it intends to prove the conspiracy in this case, and other conduct by White, through recorded conversations of White, Kemp and others. The government has indicated that a limited number of those conversations also include Defendants Carlson and Snell. Since the evidence concerning White's involvement in the alleged scheme will be proven by recordings of his voice—and perhaps documents that he may have prepared or signed, and which may be admissible against the other Defendants—the government's evidence would be the same whether defendant White was still alive or, as is now the case, is deceased. Thus, the Court does not discern any impropriety in the government joining all Defendants in the same indictment, even though White is now deceased. No party has cited any case law or persuasive reason that the death of an indicted Defendant requires the grand jury to redraft the indictment.

III. Standard for Ordering Severance

Rule 14 of the Federal Rules of Criminal Procedure provides in relevant part, "If it appears that a defendant or the government is prejudiced by a joinder of . . . defendants . . . for

trial together, the court may order an election or separate trials of counts, grant severance of defendants or provide whatever other relief justice requires." FED. R. CRIM. P. 14.

The Supreme Court has stated that "[t]here is a preference in the federal system for joint trials of defendants who are indicted together." Zafiro v. United States, 506 U.S. 534, 537, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). This is particularly the case in conspiracy trials where "joint trials . . . [can] aid the finder of fact in determining the 'full extent of the conspiracy.'" United States v. Voigt, 89 F.3d 1050, 1094 (3d Cir. 1996) (quoting United States v. Provenzano, 688 F.2d 194, 199 (3d Cir. 1982)). A district court should grant a severance only in the event of a "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro, 506 U.S. at 539. The decision of whether or not to grant a trial severance is within the court's discretion. Voigt, 89 F.3d at 1095. Case law directs courts contemplating Rule 14 severance to consider both the degree of complexity of the charges and the possibility of a clear and substantial prejudice to a defendant in a joint trial. Zafiro, 506 U.S. at 539. Prejudice can result from a "spillover" effect of evidence, where the overwhelming evidence introduced at trial is inapplicable to one or more defendants and where a joint trial would compromise a specific trial right, such as the right to a speedy trial or a Sixth Amendment right to confront one's witnesses. See, e.g., United States v. McGlory, 968 F.2d 309, 340 (3d Cir. 1992); United States v. Branker, 395 F.2d 881, 887-88 (2d Cir. 1968).

The degree of the complexity of the charges also bears on the possibility of prejudice to particular defendants in a joint trial. The main determinant is whether the jury can appropriately compartmentalize the evidence in a case so as to consider the evidence only as it relates to the

relevant defendant. McGlory, 968 F.2d at 340. It is not enough to show that a separate trial would increase a particular defendant's chance for acquittal. Id. However, when many defendants are tried together in a complex case, a joint trial can be prejudicial where multiple defendants have been named haphazardly or without commonality of proof or evidence. Kotteakos v. United States, 328 U.S. 750, 774-75, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946). The Supreme Court in Kotteakos reviewed an appeal from a case involving the consolidation of eight or more conspiracies relating to violations of the National Housing Act, when the only connection between these conspiracies was the common participation of one defendant. Id. at 751. The indictment listed thirty-two defendants. Seven of these defendants were found guilty at trial. The government admitted to a variance of proof between the separate conspiracies alleged, but denied that this variance was prejudicial to defendants. Id. at 756. Although the indictment in that case only charged one conspiracy, the government had proven eight distinct conspiracies at trial. Id. at 767. The trial court had failed to caution the jury with regard to the separate conspiracies, which constituted prejudicial error, requiring reversal. Id. at 777.

If the trial court makes an effort to cautiously instruct the jury and the government can present its case well enough to distinguish charges and defendants, courts have affirmed the denial of motions for trial severances. See United States v. DiPasquele, 740 F.2d 1282, 1294 (3d Cir. 1984) (affirming the conviction of various extortion conspirators, where the trial court did not abuse its discretion in denying severance to any of the defendants because specific instructions to the jury and a well-presented case by the government avoided the possibility of prejudice).

IV. Granting Severance Is Proper in this Case as to LeCroy, Snell and Carlson

This case involves numerous charges of varying crimes against eight remaining Defendants. On July 23, 2004, the Court granted the government's motion to have the case declared complex. (Docket No. 62)

In United States v. Serafini, 7 F. Supp. 2d 529 (M.D. Pa. 1998), the indictment charged the defendants with both conspiring to violate and violating the Federal Election Campaign Act, 2 U.S.C. §§ 431 et seq. One public official defendant, Serafini, was charged with perjury for allegedly lying to the grand jury regarding a contribution reimbursement he had received. Serafini was named in only one of the 140 counts in the indictment. The government argued that Serafini was an "unindicted conspirator" and that although he was not charged in the general conspiracy, he was clearly involved. Id. at 551. The trial court concluded that Serafini's trial should be severed from the trial of the rest of the defendants because the indictment did not allege that the perjury was in furtherance of the underlying conspiracy. Id. The court further held that the presence of a particular defendant or transaction in the perjury charge and in the conspiracy charges did not constitute a sufficient link to allow for a joint trial. Id. In addition, the court held that severance was warranted because the government attempted to attach Serafini to a conspiracy to violate federal election laws, even though the government did not allege Serafini had knowledge of that conspiracy, such that a joint trial would present a strong possibility of guilt by association. Id. at 555.

The government emphasizes that the court in Serafini based its holding largely on the fact that the evidence regarding the other 139 counts in the indictment did not concern Serafini's conduct. (Br. ¶ 14.) In the current case, maintains the government, the evidence the government

will present regarding the conspiracy involving White and Kemp will have a bearing on the charges against all Defendants.

Defendants rely on the Second Circuit's decision in Branker, 395 F.2d at 887, to support their position that in complex cases, severance is strongly justified. The court in Branker held that the joinder of some defendants accused of a few tax counts with defendants who were charged with over eighty counts relating to other substantive tax offenses had been prejudicial to the minor defendants. Id. at 888. The court stated that as the number of counts increases, the record becomes more complex. Id. It further noted that the defendants in the tax counts had little connection to the other substantive charges, and that the indictment presented little overlap of evidence between the charges. Id. The government responds that, in contrast to the facts in Branker, the charges against all defendants are related, and that a substantial overlap in evidence is apparent.

The decision in this district that presents the strongest support for severance in this case is United States v. Brodie, No. 00-CR-629-4, 2001 WL 849712 (E.D. Pa. June 19, 2001) (McLaughlin J.). The court granted severance to a defendant, Dolan, when he was charged in only one count of a seventy-seven count indictment (for making false statements to United States Customs officials), while the other defendants were charged with violating trade regulations between the United States and Cuba. Id. at *1. A chemical company, Bro-Tech, allegedly shipped ion exchange resins to Cuba through intermediary countries. Id. Dolan allegedly withheld documents from United States Customs Agents and made false statements relating to the sale. Id. at *2. Judge McLaughlin noted that the alleged conduct of Dolan took place over a thirteen-day period, as opposed to the conduct of the other defendants which occurred over an

eight-year period. Id. In addition, like Carlson, Snell and LeCroy, Dolan was not charged with the underlying conspiracy, and a joint trial would have taken weeks, even though a comparatively small quantum of the evidence would have related to Dolan. Id. at *3. The court held that a severance was warranted because of the risk of prejudice from a "spillover" effect of the overwhelming evidence irrelevant to the charges against Dolan. Id. The court expressed concern over the different nature of the charges involved and concluded that limiting instructions to the jury would not have sufficed to avoid prejudice to Dolan. Id.

In response, the government emphasizes that, unlike Brodie, the joint trial in this case will involve a substantial overlap of evidence. (Br. at 24.)

Although the Court has found that the joinder of all charges and Defendants in the single indictment was proper, a severance of LeCroy, Snell and Carlson is appropriate to prevent spillover, and will impose little burden on the government for the reasons that were stated in greater detail at the hearing on November 23, 2004. As one example, the government indicated that the recorded conversations involving Carlson are approximately 20-25 in number, and the recordings of Snell are of a similarly small number, compared to the many hundreds of conversations that the government has involving the Defendants who are charged with the conspiracy.

Because of this disparity in the volume of recorded conversations relevant as to the five Defendants charged with conspiracy, and also because of the significantly shorter time it will take to present evidence against only these three Defendants, as opposed to the other five Defendants, and the concomitant burdens on these Defendants and their counsel in sitting through a lengthy trial, most of which would not pertain to these three Defendants, the Court

believes, in its discretion, that severance is appropriate. The government will be entitled to present background facts relating to the alleged favoritism given to White and his alleged scheme with Kemp. It is possible that some of this evidence may be subject to a stipulation to be read to the jury or some other summary-type background, but it is uncontroverted that once this background testimony has been presented, the evidence against Carlson, as to his alleged false statements, and against LeCroy and Snell, as to their alleged scheme to defraud their employer J. P. Morgan Chase, is discreet, focused and not complex.

As to the motion of Defendant Hawkins that he should be severed from the other Defendants charged with conspiracy, the Court rejects that motion because it is well accepted that all Defendants charged with the same conspiracy are generally tried together, and the Court sees no reason why Hawkins should have a separate trial.

Although Defendants Snell and LeCroy object to being tried with Carlson, Carlson does not object to being tried with them. The Court has determined that the government will be entitled to introduce general background evidence as to White and Kemp's alleged scheme, which is likely relevant as to all three Defendants. The charges against LeCroy and Snell are identical, although the charges against Carlson are different. The charges against all three are two distinct subsets, compared to the broad nature of the charges against the five Defendants charged with conspiracy. Thus, the Court believes that with appropriate instructions, including instructions during the trial as to what evidence may relate to specific Defendants, and allowing for phasing of opening statements by counsel as the trial proceeds, the jury will have a clear picture of what evidence is being introduced as to which of these three Defendants.

The Court has also determined that the trial against these three severed Defendants will

proceed first in that the cases against them are relatively simple, their counsel have objected (at least prior to November 23, 2004) to any postponement of the trial, now set for January 12, 2004. At the November 23 hearing, counsel for LeCroy requested additional time. The Court feels that the new start date of January 18, 2005 will give defense counsel adequate time to prepare. As noted at the hearing, counsel for LeCroy and Snell are being compensated by the former employer, and thus, if they need additional resources over the ensuing sixty days, the Court assumes that will be made available to counsel so they can be prepared to begin on January 18. Keeping in mind that these defense counsel will have had approximately four months of open discovery from the government, and the limited nature of the charges, the Court believes this time is sufficient.

V. Bill of Particulars

Fed. R. Crim. P. 7(f) specifically empowers the trial court to direct the filing of a bill of particulars, and federal trial courts have always had very broad discretion in ruling upon requests for such bills. See Will v. United States, 389 U.S. 90, 98-99 (1967); United States v. Kenny, 462 F.2d 1205, 1212 (3d Cir. 1972). The current case law does not favor granting motions for bills of particulars. In fact, Defendants cite no Third Circuit cases reversing for failure to grant such a motion. Also, the most recent case Defendants cite in support of granting a motion for a bill of particulars comes from the Second Circuit from 1987. See United States v. Bortnovsky, 820 F.2d 572 (2d Cir. 1987) (reversing because of denial of bill of particulars and finding defendants were hindered in preparing their defense by district court's failure to compel government to reveal crucial information not available from indictment).

The Third Circuit addressed motions for bills of particulars in depth in United States v.

Addonizio, 451 F.2d 49 (3d Cir. 1971) (affirming denial of bill of particulars). The Third Circuit explained:

> The purpose of the bill of particulars is to inform the defendant of the nature of the charges brought against him to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense. A bill of particulars should fulfill this function when the indictment itself is too vague and indefinite for such purposes.

Id. at 63-64. Courts are especially reluctant to direct the filing of a bill of particulars when the government has provided the defendant with extensive pre-trial discovery. See United States v. Grass, 274 F. Supp. 2d (M.D. Pa. 2003) (denying motion for bill of particulars because government had supplemented indictment with extensive pre-trial discovery, set up an open file policy with defendants and provided Brady and Jencks materials); United States v. Grasso, 173 F. Supp. 2d 353 (E.D. Pa. 2001) (denying bill of particulars because government provided extensive discovery); United States v. Barnes, 158 F.3d 662 (2d Cir. 1998) (affirming district court's denial of bill of particulars because government had provided extensive additional information). Moreover, when information requested in a motion for a bill of particulars is available in another form, a bill of particulars is not required. United States v. Butler, 822 F.2d 1191, 1193 (D.C. Cir. 1987). However, disclosure by the government of "mountains of documents" is not an adequate substitute for a bill of particulars when the disclosure does not provide guidance regarding what the government would prove at trial. See United States v. Stocker, Crim. No. 89-00463-01, 1990 WL 157153 (E.D. Pa. October 10, 1990) (granting in part, denying in part motion for bill of particulars). Another consideration is whether a Superseding Indictment will provide additional facts to the Defendants. See United States v. Wabo, 290 F.

Supp. 2d 486 (D.N.J. 2003) (denying motion for bill of particulars because Superseding Indictment contained sufficient factual and legal information for defense to prepare its case).

A bill of particulars should be granted when, in the trial court's discretion, it appears the indictment is too vague to inform the defendant of the nature of the charges against him or her. United States v. Rosa, 891 F.2d 1063, 1067 (3d Cir. 1989). Although Rule 7(f) is construed liberally to allow bills of particulars, it does not permit a defendant to receive wholesale discovery of the Government's evidence. Id. at 1066. The Third Circuit has stated:

> Trial judges must be allowed to exercise broad discretion in order to strike a prudent balance between the defendant's legitimate interest in securing information concerning the Government's case and numerous countervailing considerations ranging from the personal security of witnesses to the unfairness that can result from forcing the Government to commit itself to a specific version of the facts before it is in a position to do so.

Id.

On appeal, a district court's denial of a motion for a bill of particulars is reviewed for abuse of discretion. Id. The denial of a motion for a bill of particulars does not amount to an abuse of discretion unless the deprivation of the information sought leads to the defendant's inability to adequately prepare his case, to avoid surprise at trial, or to avoid the later risk of double jeopardy. Addonizio, 451 F.2d at 64. A defendant cannot successfully attack the denial of a bill of particulars unless he demonstrates both that the trial court abused its discretion in denying relief and that surprise or other prejudice resulted from his having been deprived of the requested information at the pre-trial stage. See Rosa, 891 F.2d at 1067 (holding that denial of bill of particulars did not warrant reversal even if there was abuse of discretion because defendant did not show prejudice).

In this case, the Court finds that the indictment itself is very detailed, the government has provided basically open discovery of its evidence, much of it in computer-searchable format, and the length of time, from the filing of the indictment and the production of the government's evidence, until the date of trial, provides ample opportunity for preparation such that the request for bill of particulars by Defendants Hawkins and Snell will be denied.

VI. Trial Date for the Conspiracy Defendants

The fact of the severance will require a delay in the trial of the five Defendants charged with conspiracy, which will give their counsel more opportunity to review the government's evidence and prepare for the trial. Counsel for Holck and Umbrell asserted that it would be "impossible" for them to be ready for trial as of the originally scheduled date of January 12, 2005 in the context of the realities and the practicalities of preparing this complex criminal case for trial and trying it. At the November 23 hearing, the Court announced, because of the severance and to give the conspiracy Defendants more time to prepare, that this second trial will begin on February 14, 2005.

There is no question that the Defendant has the right to have his selected counsel actually try the case, and also that there be sufficient time to prepare. However, it is fully accepted in the contemporary world of complex criminal (and civil) litigation that lead counsel for a Defendant will be assisted by a team of other lawyers and legal assistants in both the preparation and trial of the case. Whether the jury ever sees these other people is beside the point—they are an integral part of the preparation process.

The trial date has been the subject of considerable discussion at all of the pretrial conferences which this Court has held. The date of January 12, 2005 was set immediately

following the first telephonic pretrial conference, on July 20, 2004. Despite objections from counsel for Defendants Holck and Umbrell, the date had never been changed prior to November 23, 2004. At two of the pretrial conferences, on August 25, 2004 and September14, 2004, the Court met with defense counsel in camera to review the status of their preparation for trial, logistical problems they were having receiving and absorbing information from the government, and similar matters. There was some discussion of the types of defenses that their clients may assert and how much preparation time that might take. Without revealing any of the comments by defense counsel at these in camera conferences, it would be fair to say that as a result thereof, the Court encouraged, if not required, the government to provide information promptly, and also in computer-searchable formats. As the Court advised defense counsel, a single lawyer could not prepare this case and hope to try it in the foreseeable future, and that all defense counsel, particularly in the review of the discovery provided by the government, would have to employ other associate lawyers, legal assistants and investigators. If necessary, the Court offered to consider the appointment of such assistance through the Criminal Justice Act if any Defendant could not afford it, but no such request was made.

Although counsel for some Defendants may have been slow in starting a defense team, there is no question from the colloquy at the November 23, 2004 conference that they now have a significant defense team working in a cooperative way with each other.

As in so many other aspects of contemporary life, information technology has changed the world of litigation. Documents can be scanned and "read" and the information in the documents is instantly retrievable according to specific input codes, names, dates, etc. The evidence in this case is largely available on such computer-based programs, such as IPRO, a

proprietary search engine with which the undersigned is personally familiar. The pretrial conferences held on August 25, 2004 (N.T. 57-62) and September 14, 2004 (N.T. 32-34) contained discussions on the government making available computer-searchable data. As a result, a great deal of the discovery, including the recorded conversations, the grand jury testimony, and the FBI "302" reports were all subject to computer-powered searches for details such as names, dates, identity of transactions, etc. No longer do lawyers have to manually read through thousands of documents to ascertain the existence, or absence, of a particular name or event.

It is also important to note that at some point, apparently, all defense counsel have cooperated in hiring an independent firm that has taken on the role of processing the large amount of information made available to defense counsel, and is apparently working with lawyers and legal assistants for several if not all Defendants.

Even though there are 25,000 recorded conversations in this case, they are computer-searchable. The government has indicated that less than 600 are considered "pertinent." There is no doubt that defense counsel may find many recorded, and additional non-recorded, conversations pertinent for the defense of their own clients, either by way of cross examination of government witness or to bolster their own defense. Thus, despite the fact that this very large group of recorded conversations exists, it does not necessarily constitute the entire universe of admissible conversations. The government witnesses, and/or the Defendants' witnesses, may have been involved in countless hundreds or even thousands of additional conversations that were never recorded, and these may be admissible into evidence, even though the government has no knowledge of them. Thus, merely because defense counsel point to a large number of

recorded conversations, and assuming the inability of a single defense lawyer to listen to all of them pretrial, does not require a delay in the trial. Rather, in consultation with the client, each defense counsel can ascertain when, where and with whom their client was having meetings or speaking, and proof as to those meetings and conversations may well be admissible, recorded or not. The government has acknowledged its obligation to indicate specifically exculpatory conversations involving any Defendant. Now that the trial of these Defendants has been continued from January 12, 2005 to February 14, 2005, this additional thirty-day period will supply ample time for counsel appropriately to accelerate, and by February 14, 2005, have completed, pretrial preparation.

Counsel for Holck and Umbrell—who argue most vociferously for more time—are highly experienced, their fees are being paid by their clients' former employer, and thus they have the resources to hire additional attorneys, legal assistants, and/or investigators. They have embraced the use of computer technology to review the evidence, and will have approximately eighty days from the last pretrial conference of November 23, 2004 to the new trial date of February 14, 2005. Given the over five months they will have had with the government's available discovery, the Court finds that they can be prepared for February 14, and rejects, as unfounded, their suggestion that their clients' constitutional rights to a fair trial will have been violated.[2]

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[2]Government counsel also requested additional time from February 14, 2005 so that there would be a longer hiatus between the end of the first trial and the beginning of the second, and suggested that the second trial begin in early April 2005. Counsel for Defendant Hawkins is not available because he has been specially listed to start a major narcotics conspiracy trial in the Eastern District of Michigan on April 5, 2005. After consultation by the undersigned with the judge presiding over that trial (which may last a number of months, through the summer of 2005), this Court, as stated before, is unwilling to postpone this case until the fall of 2005. However, if Hawkins' counsel is able to resolve his scheduling conflict promptly, the Court will consider a short postponement of the second trial. In view of other criminal cases on the Court's

The Court has balanced the requests for additional time against the interest of the public in a prompt trial. The accusations in the indictment are like a cloud, hanging not only over the specific Defendants, but also over the conduct of City business, and only evidence in the courtroom, or the lack thereof, will remove this cloud. In any event, the evidence will be on the public record, and doing so as promptly as possible, consistent with the Defendants' right to prepare for trial, is in the public interest. Undue delay of this case is decidedly against the public interest. As the Supreme Court stated, albeit in a different context, "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interest of the accused." United States v. McDonald, 435 U.S. 850, 862 (1978) (quoting Barker v. Wingo, 407 U.S. 514, 519 (1972)). Under the Speedy Trial Act, 18 U.S.C. § 3161 et seq., the Court must give considerable weight to these public interest policy factors, particularly in a case charging public corruption. Also, prompt airing of these charges in a public courtroom will allow the body politic of Philadelphia to evaluate whether City business was conducted in the way the indictment alleges, and if so, what to do about it.

An appropriate Order follows.

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docket, many of which have their own speedy trial deadlines, this adjustment must be made promptly, if it is to be made.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
COREY KEMP, et al.	:	NO. 04-370

PRETRIAL ORDER NO. 10

AND NOW, this 2nd day of December, 2004, based on the hearing on November 23, 2004, and the foregoing Memorandum, it is ORDERED as follows:

1. The Motions of Defendants Carlson (Docket No. 88), LeCroy (Docket No. 158) and Snell (Docket No. 160) for severance from the other Defendants for trial are GRANTED, and their trial will begin with jury selection on January 18, 2005 at 9:30 a.m. in the Ceremonial Courtroom.

2. The trial of the remaining Defendants will begin with jury selection on February 14, 2005 at 9:30 a.m. in the Ceremonial Courtroom.

3. The Motions to Sever filed by Defendants Kemp (Docket No. 231) and Hawkins (Docket No. 180) are DENIED.

4. The Motions for Bills of Particulars filed by Defendants Hawkins (Docket No. 182) and Snell (Docket No. 162) are DENIED.

5. The Motions of Defendant Hawkins for Disclosure of Brady Materials (Docket No. 181) and by Defendant Knight for Disclosure of Exculpatory Evidence (Docket No. 196) are GRANTED to the extent that the government is under a continuing obligation to produce such evidence, but are DENIED as to any specific disclosure requirement at this time, since the

government has acknowledged its disclosure obligations from the onset of this case.

6. The Motion of Defendant Hawkins to Adjourn the Trial Date (Docket No. 179) is DENIED as moot.

7. The government shall make transcripts of recorded conversations that it intends to use against Defendants Carlson, LeCroy and Snell available to their defense counsel no later than December 17, 2004. The government shall produce trial transcripts which it intends to use against the other Defendants no later than December 31, 2004, and shall produce such transcripts as are available prior to the deadline date, as soon as they are completed and proofread for accuracy.

8. As to Defendants Carlson, LeCroy and Snell, all pretrial motions, in connection with the receipt of evidence at trial, or otherwise, shall be filed by December 13, 2004. The government's response is due by December 22, 2004; a hearing on these motions will be held on January 11, 2005 at 4:00 p.m. in Courtroom 17B.

9. The next pretrial conference will be held on December 21, 2004 at 4:00 p.m. in Courtroom 17B.

BY THE COURT:

s/Michael M. Baylson
Michael M. Baylson, U.S.D.J.